LIBRARY
SUPREME COURT, U. S.

FILED
MAR 7 1969
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 1129

MOTORISTS MUTUAL INSURANCE COMPANY,
Petitioner,

v.

TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EMERSON BOYD
WILLIAM V. HUTCHENS
10th Floor, Consolidated Building
Indianapolis, Indiana 46204

MARTIN J. FLYNN
734 15th Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner.

Of Counsel:

SHEA & GARDNER,
734 15th Street, N.W.
Washington, D. C. 20005

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
1. *The decision below conflicts with decisions in other circuits holding that the amount in controversy in a declaratory judgment action is the amount of the liability that plaintiff's action seeks to avoid.*	7
2. *The decision below should be reveiwed in light of recent decisions in other circuits dealing with the issue of the federal jurisdictional amount in actions involving multiple claims*	10
a. *Aggregation of separate claims in class actions.*	10
b. *Jurisdiction over closely related claims against multiple parties when only one meets the jurisdictional requirement.*	10
3. *The decision below should be reviewed in light of this Court's decision in* Horton v. Liberty Mutual Ins. Co., *367 U.S. 348, and in light of decisions in other circuits holding that jurisdiction of a claim should be sustained when a compulsory counterclaim in the action independently meets the required jurisdictional amount.*	12
Conclusion	16

CITATIONS

Cases:

C. E. Carnes Co. v. *Employers' Liability Assur. Corp.*, 101 F. 2d 739, 741 (1939)	8–9
Davis v. *American Foundry Equipment Co.*, 94 F. 2d 441, 443 (7th Cir. 1938)	7

Cases—Continued

	Page
Eagle Star Insurance Company v. *Maltes*, 313 F. 2d 778 (1963)	9
Franklin Life Ins. Co. v. *Johnson*, 157 F. 2d 653 (10th Cir. 1946)	8
Gas Service Co. v. *Coburn*, No. 117, OT 1968	7, 10
Ginsberg v. *Pacific Mut. Life Ins. Co.* 69 F. 2d 97 (2d Cir. 1934)	15
Hawkeye Security Insurance Co. v. *Davis* 277 F. 2d 765 (8th Cir. 1960)	9
Horton v. *Liberty Mut. Ins. Co.* 367 U.S. 348 (1961), affirming 275 F. 2d 148 (5th Cir. 1960)	12, 13, 14
Jacobson v. *Atlantic City Hospital* 392 F. 2d 149 (3rd Cir. 1968)	11, 12, 15
Jefferson v. *Liverpool & London Globe Ins. Co.*, 167 F. Supp. 389 (S.D. Cal. 1958)	7
Jewell v. *Grain Dealers Mutual Ins. Co.*, 290 F. 2d 11 (5th Cir. 1961)	8, 9, 11
Manufacturer's Casualty Insurance Co. v. *Coker* 219 F. 2d 631, 633 (1955)	9
Provident Bank v. *Patterson* 390 U.S. 102, 107 (1968)	11
Roberts Min. & Mill Co. v. *Schrader* 95 F. 2d 522 (9th Cir. 1938)	15
Snyder v. *Harris*, No. 109, OT 1968	7, 10
Stone v. *Stone* 37 U.S.L. Wk. 2316 (Nov. 29, 1968)	12
Trail v. *Green*, 206 F. Supp. 896 (D. N.J. 1962)	12
Trinity Ins. Co. v. *Woody*, 47 F. Supp 327 (D. N.J. 1942)	7
Wilson v. *American Chain & Cable Co.*, 364 F. 2d 558 (1966)	12

Statutes and Rules:

28 U.S.C. 1332(a)	passim
28 U.S.C. 1441	15
28 U.S.C. 2201	2–3
F.R. Civ. P. 19	11
F.R. Civ. P. 23	7, 10

Miscellaneous:

	Page
Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo. L.J. 1204 (1966)	11
1 Moore, Federal Practice, ¶ 0.97 (1964)	12
Note, 27 Ind. L.J. 199 (1952)	11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No.

MOTORISTS MUTUAL INSURANCE COMPANY,
Petitioner,

v.

TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, Deceased, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this action on December 4, 1968.

Opinions Below

The opinion of the United States District Court for the Northern District of Indiana is unreported and is attached as Appendix B, hereto. The opinion of the Court of Appeals is attached as Appendix A hereto and is reported at 404 F. 2nd 511.

Jurisdiction

The judgment of the Court of Appeals was entered on December 4, 1968. A timely petition for rehearing was filed on December 17 and was denied on January 13, 1969. The

Court of Appeals on January 20 granted petitioner's motion to stay its mandate for 30 days pending filing of a petition for certiorari, and it subsequently extended that stay until March 10, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. In an action brought by an insurer against the claimants under an insurance policy seeking a declaratory judgment that the policy did not cover the occurrence out of which the insurer's potential liability to the claimants arose, is the sum or value of the matter in controversy under 28 U.S.C. 1332(a) the insurer's potential liability to those claimants under the policy?

2. If the jurisdictional amount is in question as to the complaint, does the sum or value of the matter in controversy include a compulsory counterclaim which independently meets the jurisdictional amount under 28 U.S.C. 1332(a)?

Statutes Involved

The statutes involved are as follows:

28 U.S.C. 1332(a)(1):

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, is between—
> (1) citizens of different States . . . ."

28 U.S.C. 2201:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal rela-

tions of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Statement of the Case

This litigation arose out of a motor vehicle collision that occurred in Indiana on October 2, 1965. An automobile owned by petitioner's insured, Sylvester Griffin, but driven by one Thomas E. Penman, Jr., collided with a rented truck-tractor that was driven by respondent's decedent, resulting in the death of the decedent and property damage to the truck. The Griffin automobile was insured under a policy issued by petitioner with limits of $10,000 per person and $20,000 per occurrence for bodily injury or death and $5,000 per occurrence for property damage. The policy also obligated petitioner to defend any actions for damages payable under the policy. The coverage of the policy was limited, however, to the "insured," as defined therein, and to persons using the automobile with the permission of the insured. That question of coverage of the policy was the major issue between petitioner and respondent in the district court, but the decision of the court of appeals and the issue here relate solely to the question of the jurisdiction of the district court.

On October 25, 1965, respondent, an Indiana citizen, brought an action in the United States District Court for the Northern District of Indiana, Hammond Division at Lafayette (Civil No. 332), against Penman and Griffin, seeking damages for the death of decedent. Griffin and Penman were served as non-resident motorists. The Hertz Corporation intervened in the action seeking damages for the damage to the truck-tractor owned by it and rented to respondent's decedent.

On July 22, 1966, petitioner, a citizen of Ohio, filed this action (Civil No. 363) in the same district court against respondent and Hertz, citizens of Indiana and Delaware, respectively, seeking a declaratory judgment that the automobile insurance policy issued to Griffin did not cover Penman for the tort claims of respondent and Hertz in the pending action in that court (Civil No. 332). Penman and Griffin were not joined as defendants in that, while they were subject to service in the tort action under Indiana's non-resident motorist statute, they were not subject to service in this action.

Petitioner sought to advance this case on the calendar since, if the policy did cover the accident at issue, petitioner was obligated to defend the tort action in which respondent and Hertz were plaintiffs. The district court did not advance this action, however, and on December 30, 1966, the court entered a judgment against Penman alone in the amount of $210,000 for respondent and $14,009.19 for Hertz.

This action was set for trial on June 26, 1967. Shortly before the trial, respondent and Hertz filed counterclaims seeking to recover $10,000 plus interest and $5,000 plus interest, respectively, under the policy issued by respondent to Griffin. In addition, respondent's counterclaim sought to recover $300,000 for petitioner's failure to settle her action against Penman. She alleged that, prior to the trial in that action, she had offered to settle her claim for $10,000, that petitioner, which had assumed the defense of the action, negligently refused to accept that offer, and that Penman, after the court entered a judgment against him for $210,000, assigned to her his claim against petitioner for its refusal to settle.

The trial of the counterclaims was deferred, and, on August 21, 1967, the district court entered a declaratory

judgment for petitioner on its complaint.[1] The lengthy opinion of the district court (see Appendix B, *infra*) was devoted almost entirely to the substantive issues, but the court did deal specifically with respondent's challenge to the court's jurisdiction. Pointing out that petitioner sought a declaration of its potential liability to respondent and Hertz under a single insurance policy in connection with a single occurrence, the court held that,

> "[t]his potential liability, or, stated another way, the pecuniary result to the plaintiff which a judgment in this action would directly produce, is without question in excess of the required jurisdictional amount . . . inasmuch as the defendants herein are asserting both personal injury and property damage claims which, individually, exceed the policy limit of $10,000/$20,000 and $5,000, respectively." (Appendix B. p. 26)

Respondent (but not Hertz) appealed, and the court of appeals reversed on the ground that the amount in controversy did not meet the jurisdictional requirements of 28 U.S.C. 1332(a). The court first rejected petitioner's contention that the test for determining the jurisdictional amount in a declaratory judgment action as to liability under an insurance policy is the total liability under that policy, holding that test to be appropriate only where the insurer's potential liability to multiple claimants was joint rather than several. Second, the court rejected petitioner's contention that respondent's compulsory counterclaim, which substantially exceeded the sum or value of $10,000,

---

[1] At the trial of its complaint in this action, petitioner's counsel asserted that the deferred trial of the counterclaim made it necessary to lay the foundation for and identify exhibits and depositions during examinations of witnesses who might not later be available. Such exhibits and depositions that were not offered in evidence at the trial were left in the custody of the court for later use in the trial of the counterclaim.

should be considered in determining the jurisdictional amount. The court recognized the cases upholding petitioner's argument but held that, "irrespective of the holding in those cases, we believe that a compulsory counterclaim should not be held to give rise to federal jurisdiction where the defendant-counterclaimant has objected from the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action" and subsequently files a compulsory counterclaim in an amount exceeding the jurisdictional amount. (Appendix A, p. 21) Finally, the court held that petitioner's expenses incurred pursuant to its obligation under the policy to defend claims could not be considered in determining the amount in controversy, since the insured was not a defendant in this action.

Petitioner filed a timely petition for rehearing and, along with it, a petition to supplement the record to show that respondent on March 2, 1967—prior to the district court's decision in this action—filed in United States District Court for the Southern District of Indiana an action to recover against petitioner on the policy at issue here.[2] Both petitions were denied on January 13, 1969.

Reasons for Granting the Writ

The question of determining the jurisdictional amount in diversity actions has long been a source of conflict in the federal courts. Indeed, this Court is now faced with that

---

[2] The petition to supplement the record was filed in light of the court's puzzling statement, upon which it based its holding, that respondent "most emphatically did not want to have her counterclaim tried in federal court." (Appendix A, p. 22) Respondent's claim in the Southern District of Indiana was the same as count 1 of her counterclaim in this action, and was filed in that court on the same day that the respondent amended her answer in this action to deny petitioner's allegation of the jurisdictional amount. It should be noted also that the court below, in discussing respondent's aversion to the federal courts, erroneously referred to "the prior state court trial in which she received a judgment against Penman . . . ." (Appendix A, p. 20) In the reported opinion, the reference has been corrected to "the prior federal court trial . . . ." 404 F. 2d, at 514.

question in the context of whether the recent amendments to F.R.Civ.P. 23 permit aggregation of several and distinct claims in class actions for the purpose of satisfying the jurisdictional amount. *Gas Service Co.* v. *Coburn,* No. 117, OT 1968 and *Snyder* v. *Harris,* No. 109, OT 1968. The problem has been particularly acute in insurance litigation, which "presents unique and difficult problems in determining federal monetary jurisdiction and has spawned a plethora of decisional law." *Jefferson* v. *Liverpool & London Globe Ins. Co.,* 167 F. Supp. 389 (S.D. Cal. 1958). In this declaratory judgment action, the court below has decided two important issues concerning the determination of the jurisdictional amount in a manner conflicting with decisions in other circuits. We urge this Court to grant the writ of certiorari in order to resolve those issues for reasons expressed more fully below.

1. *The decision below conflicts with decisions in other circuits holding that the amount in controversy in a declaratory judgment action is the amount of the liability that plaintiff's action seeks to avoid.* The amount in controversy in a declaratory judgment action has been recognized generally in the federal courts, including the court below, to be "the value of that which it is sought to have declared free of doubt . . . ." *Davis* v. *American Foundry Equipment Co.,* 94 F.2d 441, 443 (7th Cir. 1938). See *Trinity Ins. Co.* v. *Woody,* 47 F. Supp. 327 (D.N.J. 1942), and cases cited therein. Thus, in *Davis* the court below held that the jurisdictional amount was met when plaintiff sought a declaration as to the validity of a contract the total value of which exceeded the jurisdictional amount, even though the amount then due plaintiff under the contract, if valid, was less than the jurisdictional amount.

The district court applied that standard in holding that it had jurisdiction in this action, since petitioner sought to

resolve the question whether it was or was not liable to respondent and Hertz in the amount of $15,000, the limits of its insurance policy. The court below referred to that standard, citing *Franklin Life Ins. Co.* v. *Johnson,* 157 F.2d 653 (10th Cir. 1946), but distinguished that case in that "the insurer was seeking a declaration of nonliability against *an individual defendant who was the named insured* . . . ." (App. A, p. 19) (Emphasis added.) In fact, *Franklin Life Ins. Co.* was an action in which the named insured —a decedent—was not a party. The *two defendants* were the named beneficiary and the contingent beneficiary under a life insurance policy on the decedent's life which was payable only in monthly installments, and the jurisdictional problem arose in that, while it was quite unlikely that either of the defendants, under their "several and separate" claims, would recover an amount under the policy that met the jurisdictional amount requirement, the plaintiff insurer's liability "to either *or both* of the defendants" under the policy did meet the requirement. 157 F.2d, at 653. (Emphasis added.) Thus, the court in *Franklin Life Ins. Co.* upheld jurisdiction in circumstances quite similar to those in this action, and the decision of the court below is in conflict.

The court below relied upon *Jewell* v. *Grain Dealers Mutual Ins. Co.,* 290 F. 2d 11 (5th Cir. 1961), in support of its holding that jurisdiction in a declaratory judgment action against multiple defendants as to whom the potential liability is several can be sustained only if each defendant's claim meets the jurisdictional requirements. (Appendix A, p. 19) That case was not a declaratory judgment action but rather involved claims for damages against multiple defendants, and the Fifth Circuit held that the claims could not be aggregated since the defendants were not jointly liable to the plaintiff. In *C.E. Carnes Co.* v. *Em-*

ployers' Liability Assur. Corp., 101 F. 2d 739, 741 (1939), however, the Fifth Circuit distinguished the test for declaratory judgment actions and upheld jurisdiction in circumstances similar to those here:

> "The amount involved is not, as appellants contend, what individual defendants claim by way of damages. This is not a tort action at all and the question of negligence vel non is not before us. The amount in controversy is the value of that which is sought to have declared free from doubt—the policy for $25,000."

In *Eagle Star Insurance Company* v. *Maltes*, 313 F. 2d 778 (1963), decided after the *Jewell* case, the Fifth Circuit reaffirmed its position in *Carnes* that cases in which injured parties seek damages against an insurer alone or in which the tortfeasor is joined, "have no bearing on the situation where the company brings a declaratory action seeking a declaration of non liability." 313 F. 2d, at 782. In short, the *Jewell* case offers no support to the court below and the Fifth Circuit's decisions conflict with the judgment below.

The decision below is also in conflict with the Fourth Circuit's decision in *Manufacturer's Casualty Insurance Co.* v *Coker*, 219 F. 2d 631 (1955), an action—like this one—for a declaratory judgment of nonliability on a casualty insurance policy. The district court had dismissed on the ground that claims of the injured third-party defendants were several and unrelated and each was less than the required jurisdictional amount, but the court of appeals reversed, stating that, "all of them, so far as the liability of plaintiff is concerned, are dependent upon the $25,000 coverage by plaintiff's policy . . ." 219 F. 2d, at 633. See also *Hawkeye Security Insurance Co.* v. *Davis*, 277 F. 2d 765 (8th Cir. 1960).

2. *The decision below should be reviewed in light of recent decisions in other circuits dealing with the issue of the federal jurisdictional amount in actions involving multiple claims.* Apart from the fact that the decision below conflicts with decisions in other circuits in cases that are, in our view, indistinguishable from this case, there have been a number of recent decisions involving the enigma of the jurisdictional amount requirement in cases involving circumstances differing from those presented here. While the decisions generally have sustained jurisdiction, the differing circumstances preclude an assertion of conflict with the decision below. At the same time, those cases, which we discuss below, point up the importance of this Court's providing further guidance to the federal courts in determining the standards embodied in 28 U.S.C. 1332(a).

a. *Aggregation of separate claims in class actions.* As we pointed out earlier, this Court now has under advisement two conflicting decisions concerning the aggregation of claims in class actions—the *Gas Service Co.* and *Snyder* cases. In *Gas Service Co.*, the Tenth Circuit held that the 1966 amendments to F.R. Civ. P. 23, which abolished the old classes of true, hybrid and spurious class actions, and intended to abolish the bases for those classes—the "obscure and uncertain" terms, " 'joint', 'common,' etc."—supported the aggregation of separate and distinct claims in class actions in order to meet the jurisdictional requirements. 389 F. 2d 831, 834. While the test for determining the amount in controversy in declaratory judgment actions, which we have discussed above, might well differ from that in connection with class actions, the importance of the effect upon the aggregation of claims in class actions resulting from the amendments to Rule 23 carries over to aggregation of claims in other types of actions.

At the same time that Rule 23 was amended in 1966, Rule 19 relating to joinder of parties was also amended, eliminating the technical concept of the "indispensable party" who had a "joint interest" in the action. See Cohn, *The New Federal Rules of Civil Procedure,* 54 Geo. L.J. 1204 (1966). The inflexible approach of many courts as to aggregation of non-joint claims in order to meet the jurisdictional amount in cases other than declaratory judgment actions, see *e.g. Jewell* v. *Grain Dealers Mutual Ins. Co., supra,* was closely related to the former Rules 19 and 20 relating to necessary and permissive joinder of parties. See Note, 27 Ind. L.J. 199 (1952). The design of amended Rule 19 to avoid the "inflexible approach" followed by many courts under the former Rule 19, *Provident Bank* v. *Patterson,* 390 U.S. 102, 107 (1968), may well call for a reexamination of cases such as *Jewell* which restricted aggregation of claims against persons whose joinder was permissive rather than necessary in that they had no "joint interest" in the action.

b. *Jurisdiction over closely related claims against multiple parties when only one meets the jurisdictional requirement.* In three recent cases, the Third and Fourth Circuits have upheld jurisdiction where the claims against multiple defendants were sufficiently related that "it seem[ed] reasonable and proper to view the lawsuit as a single 'action' within diversity jurisdiction without requiring that each claim exhibits all of the jurisdictional requirements." *Jacobson* v. *Atlantic City Hospital,* 392 F. 2d 149 (3rd Cir. 1968). There the plaintiff sought damages against a hospital and against physicians for injuries sustained, but the recovery against the hospital could not exceed $10,000 because of a statutory restriction. The court relied upon a combination of circumstances, including the fact that the claims " 'ordinarily would be tried in one

judicial proceeding' " and that such a procedure would be the "most convenient and expeditious practice" in determining that it was appropriate to decide the claim that did not meet the jurisdictional requirement as part of a "single lawsuit" with the claim that did meet the requirement. 392 F. 2d, at 154. To the same effect are the Third Circuit's decision in *Wilson* v. *American Chain & Cable Co.*, 364 F. 2d 558 (1966), and the Fourth Circuit's decision in *Stone* v. *Stone*, 37 U.S.L. Wk. 2316 (Nov. 29, 1968). All of those cases, in adopting a flexible approach to the question of the jurisdictional amount where claims of or against multiple parties were involved are inconsistent with earlier cases, see, *e.g.*, *Trail* v. *Green*, 206 F. Supp. 896 (D. N.J. 1962); 1 Moore, Federal Practice, ¶0.97 (1964), but they suggest the appropriateness of this Court's reviewing the inflexible approach under which, in cases other than declaratory judgment actions, only joint claims may be aggregated in order to meet the jurisdictional amount.

3. *The decision below should be reviewed in light of this Court's decision in* Horton v. Liberty Mutual Ins. Co., *367 U.S. 348, and in light of decisions in other circuits holding that jurisdiction of a claim should be sustained when a compulsory counterclaim in the action independently meets the required jurisdictional amount.* The court below cited a number of cases recognizing that federal jurisdiction should be sustained in an action when, though the plaintiff's claim does not meet the required jurisdictional amount, a compulsory counterclaim filed in the action does meet that amount. (Appendix A. p. 21). It declined to follow those cases, here, however, since it determined that respondent's objections to the court's jurisdiction over petitioner's claim indicated that she "most emphatically did not want to have her counterclaim tried in a federal court." (Appendix A, p. 22). Apart from the question

of whether the court's view of respondent's litigation strategy was accurate, see p. 6, n. 2, *supra*, its holding that the determining factor upholding jurisdiction is whether the counterclaimant would have filed in a federal court had she won the race to the courthouse is inconsistent with decisions in other circuits and, further, should be reviewed in light of this Court's decision in *Horton* v. *Liberty Mut. Ins. Co.*, 367 U.S. 348, affirming 275 F. 2d 148 (5th Cir. 1960).

In the *Horton* case, the plaintiff insurer filed a diversity action in the district court to set aside an award of the Texas Industrial Accident Board in the amount of $1,050 in favor of Horton, alleging that Horton had sought to recover from the Board the amount of $14,035 but was entitled to recover nothing at all. Horton then filed an action in the state court to set aside the Board's award and recover the $14,035 that he had claimed before the Board. He then moved to dismiss the insurer's claim on the ground that the amount in controversy was only the amount of the award but contemporaneously filed a compulsory counterclaim, subject to his motion to dismiss, seeking to recover the full $14,035. The district court dismissed the action and the court of appeals reversed on two grounds. It held first that the amount in controversy in the insurer's claim should be regarded as the amount claimed by the employee—Horton—rather than the amount of the award that the insurer sought to set aside in the action. Alternatively, it held that,

> "it is the long established rule that where, as here, the jurisdictional amount is in question, and a counterclaim is brought in an amount which, in itself or added to the amount claimed in the complaint, adds up to an amount in excess of the minimum jurisdictional amount, jurisdiction is established whatever may be

the conclusion viewed from the plaintiff's complaint alone." 275 F. 2d, at 152.

This Court in affirming the court of appeals' decision held that the record showed that the amount in controversy exceeded $10,000 in that Texas law permitted both parties to challenge the award of the Board, the plaintiff insurer alleged in its complaint that Horton had claimed and would claim $14,035, and Horton did later claim that amount in his counterclaim. 367 U.S., at 353-4. This Court's opinion in *Horton* did not focus squarely on the Fifth Circuit's alternative ground, though the dissenting opinion stated that "[i]t seems impossible to avoid the conclusion that the Court is allowing diversity jurisdiction to be predicated upon a counterclaim which might possibly be filed by petitioner." *Id.*, at 358.

This case, in our view, presents an appropriate vehicle for this Court to apply its decision in *Horton* and outline the scope of that decision as to the circumstances in which a counterclaim may provide the basis for jurisdiction when the jurisdictional amount in the plaintiff's claim is in question. Moreover, nothing in this Court's opinion disapproved of the Fifth Circuit's alternative holding in *Horton,* which is squarely in conflict with the decision of the court below in this case. The Fifth Circuit clearly did rely upon the counterclaim as a basis for upholding jurisdiction, and in circumstances where Horton had filed his claim first in the state court and then as a counterclaim in the federal court, subject to his motion to dismiss the plaintiff's claim. Certainly the record established that he did not want to have the counterclaim tried in federal court, but the Fifth Circuit did not regard that factor as relevant to the question whether federal jurisdiction should be sustained. Neither did other decisions upholding jurisdiction where

the counterclaim met the jurisdictional amount rely upon a determination that the defendant-counterclaimant would have filed in federal court if he had filed first. See, *e.g.*, *Roberts Min. & Mill Co.* v. *Schrader*, 95 F. 2d 522 (9th Cir. 1938); *Ginsberg* v. *Pacific Mut. Life Ins. Co.*, 69 F. 2d 97 (2d Cir. 1934).

The effect of the judgment below, which remanded with instructions to dismiss the suit, including the counterclaim, is merely to impede the considerations of judicial economy which decisions such as *Jacobson* v. *Atlantic City Hospital*, *supra*, sought to advance. When a claim meets the federal jurisdictional requirements, nothing in the removal statute, 28 U.S.C. 1441, precludes its removal to federal court merely because the plaintiff does not want to be in federal court. Thus, the court below has merely extended the burden on the courts by permitting the respondent to file its counterclaim in state court subject to its being removed to federal court.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

EMERSON BOYD
WILLIAM V. HUTCHENS
10th Floor, Consolidated Building
Indianapolis, Indiana 46204

MARTIN J. FLYNN
734 15th Street, N.W.
Washington, D. C. 20005
Attorneys for Petitioner.

Of Counsel:

SHEA & GARDNER,
734 15th Street, N.W.
Washington, D. C. 20005

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 SEPTEMBER SESSION, 1968

No. 16659

MOTORISTS MUTUAL INSURANCE COMPANY, *Plaintiff-Appellee,*

v.

TERESA SIMPSON, Administratrix of the Estate of Raymond K. Simpson, Deceased, *Defendant-Appellant.*

DECEMBER 4, 1968

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

Before DUFFY, *Senior Circuit Judge,* KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This appeal in a diversity action arises from a declaratory judgment in favor of the plaintiff, Motorists Mutual Insurance Company. The judgment below declared that Thomas E. Penman, Jr. was not covered by an automobile insurance policy issued by Motorists Mutual to an Ohio resident, Sylvester Griffin, the named insured, and insuring Griffin's automobile. The policy stipulated that Motorists Mutual's liability was limited to $10,000 "per person," $20,000 "per occurrence" for bodily injury or death, and $5,000 for property damage plus the expenses of defense of tort actions.

In a prior lawsuit tried before the same district court, driver Penman was sued by those who are the defendants in the present action, The Hertz Corporation and Teresa Simpson, administratrix of the estate of Raymond K. Simp-

son, deceased.[1] The earlier court trial showed that while driving Griffin's automobile on a public highway in Indiana on October 2, 1965, Penman negligently killed Raymond K. Simpson, Teresa Simpson's husband. Penman was adjudged liable to Mrs. Simpson as administratrix in the sum of $210,000 and liable to The Hertz Corporation, owner of the truck which Raymond K. Simpson was driving, in the sum of $14,009.19.

It is defendant-appellant Simpson's contention that the district court's disposition of the present case was based on two principle errors: (1) assuming jurisdiction over this case and (2) determining that Penman was not covered by and insured under the policy issued to Griffin. Since we find that the district court erred in assuming jurisdiction over this case, it is unnecessary to consider the second error raised in this appeal.

Before commenting on the jurisdictional contentions advanced by the parties, it is essential to state the precise question presented. The problem is whether the amount in controversy is sufficient to give a federal court jurisdiction. The jurisdictional statute under which this action was brought provides that a district court has jurisdiction only where the "matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs." 28 U.S.C. § 1332(a).

Motorists Mutual advances what purports to be three distinct theories to support its contention that the requisite jurisdictional amount is in controversy. The first theory advanced is that because the personal injury and the property damage insurance coverages here in issue are contained in the same instrument, the two separate coverage limits, $5,000 and $10,000, can be aggregated for purposes of determining jurisdictional amount. The district court's opinion emphasized the fact that this action put into issue Motorists Mutual's potential liability under this *single* policy of insurance.[2]

---

[1] Teresa Simpson, administratrix, is the sole appellant in this appeal.

[2] In disposing of the jurisdictional question the district judge stated in part:

> This is a declaratory judgment action brought by a *single* party, the

Motorists Mutual likewise ascribes to the notion that since a declaratory judgment with respect to insurance contract coverage is sought, the test for determining the amount in controversy is the total value of the policy, citing cases such as *Franklin Life Ins. Co.* v. *Johnson,* 157 F. 2d 653 (10th Cir. 1946) and *Trinity Universal Ins. Co.* v. *Woody,* 47 F. Supp. 327 (D.N.J. 1942) to support its position. A significantly different factual situation existed in those two cases since the insurer was seeking a declaration of nonliability against an individual defendant who was the named insured and consequently the value of the entire policy was the accurate measure of the amount in controversy. That is not the situation in the case at bar.

When two or more claimants are joined as defendants in one declaratory judgment suit, the pecuniary test of jurisdiction depends on whether the potential liability of the insurer is joint or several. If joint, the matter in controversy between the insurer and the defendants is the sum of the potential claims. On the other hand, if the insurer's potential liability is several, jurisdiction under section 1332(a) can be sustained only against those defendants whose respective controversies individually involve matters exceeding the jurisdictional amount. See, *e.g., Jewell* v. *Grain Dealers Mutual Ins. Co.,* 290 F. 2d 11 (5th Cir. 1961).

Applying these general rules to the case before us, it is clear that the aggregation of the claims is erroneous. The nonliability which Motorists Mutual asserts against Mrs.

---

insurer of the subject automobile, wherein said party is exposed to a total potential liability under this *single* policy of insurance. The accident out of which plaintiff's potential liability arises was a single occurrence, and plaintiff's liability or non-liability under the instant policy of insurance will likewise be decided as a single matter. . . . Properly speaking, it is plaintiff's entire potential liability under its insurance policy, which liability turns on a construction of the terms of its insurance policy, which is the actual matter in controversy in this action. This potential liability, or, stated another way, the pecuniary result to the plaintiff which a judgment in this action would directly produce, is without question in excess of the required jurisdictional amount . . . inasmuch as the defendants herein are asserting both personal injury and property damage claims which, individually, exceed the policy limits of $10,000/$20,000 and $5,000, respectively.

Simpson relates to the death claim clause in the policy, whereas the nonliability asserted against Hertz arises out of the separate property damage coverage in the policy. The potential liability of Motorists Mutual to the two defendants is several, not joint. That the foundation of both potential claims is based on provisions in the same document is immaterial. The Supreme Court has squarely dealt with the common instrument argument asserted by Motorists Mutual: "Aggregation of plaintiffs' claim cannot be made merely because the claims are derived from a single instrument. . . ." *Thomson* v. *Gaskill*, 315 U.S. 442, 447 (1942). Therefore, despite the fact that the two potential claims in issue here arise from the same insurance policy, they may not be aggregated for the purpose of giving jurisdiction under section 1332(a).

The second theory proposed by Motorists Mutual to sustain federal court jurisdiction is that the sum sought in the counterclaim filed by Mrs. Simpson should be considered in determining the amount in controversy. The facts with respect to this counterclaim are as follows. After the district court's denial of her motion to dismiss the plaintiff's complaint for lack of jurisdiction, Mrs. Simpson filed, shortly before the trial of the instant action, a counterclaim asking for judgment against Motorists Mutual in the amount of $300,000. In the counterclaim, Mrs. Simpson alleged that prior to the state court trial in which she received a judgment against Penman she made an offer to Motorists Mutual, who had assumed the defense of the lawsuit, to settle and compromise her claim for $10,000, "the policy limit of the insurance contract"; that the insurance company negligently and in "bad faith" refused the offer, thus ultimately exposing Penman to a liability of $210,000, the amount of the judgment for Mrs. Simpson entered by the court following the trial; and that subsequently Penman assigned to her "for good and valuable consideration" his right of action against Motorists Mutual for its "wrongful and unreasonable refusal to settle" the claim asserted by Mrs. Simpson.

When a claim over which there is otherwise jurisdiction does not embrace an amount in controversy in excess of that required by the statute, the "plaintiff-viewpoint" rule, under which jurisdiction on the basis of what the plaintiff claims,

requires dismissal of the claim.[3] A problem arises, however, when, although the plaintiff's claim does not involve the requisite jurisdictional amount, a compulsory counterclaim is filed which independently meets the required amount. There are cases which hold that in such a situation federal jurisdiction should be sustained.[4]

But irrespective of the holding in those cases, we believe that a compulsory counterclaim should not be held to give rise to federal jurisdiction where the defendant-counterclaimant has objected from the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action on the ground that the amount in controversy in that action is insufficient and additionally, after his jurisdictional objection is overruled, files a compulsory counterclaim even though the amount therein involved exceeds $10,000 exclusive of interest and costs.

When a defendant files a compulsory counterclaim seeking in excess of $10,000 without initial objection to federal court jurisdiction over a main action that lacks the requisite amount in controversy, it may reasonably be argued that the defendant-counterclaimant is satisfied with federal juris-

---

[3] The rule that the amount in controversy should be determined from the standpoint of the plaintiff has been cited with favor by the Supreme Court: "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that . . . the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283, 288 (1938).

[4] *E.g., Clarkson* v. *Manson*, 4 F. 257 (C.C.S.D.N.Y. 1880); *Lee* v. *Continental Ins. Co.*, 74 F. 424 (C.C.D. Utah 1896); *Ginsburg* v. *Pacific Mutual Life Ins. Co. of Calif.*, 69 F. 2d 97 (2d Cir. 1934); *Liberty Mutual Ins. Co.* v. *Horton*, 275 F. 2d 148 (5th Cir. 1960), *aff'd*, 367 U.S. 348 (1961) (four justices dissenting) (*semble*). The Second Circuit in *Ginsburg, supra*, after first determining that the plaintiff's claim satisfied the jurisdictional requirement of $3,000, gave as a second ground for sustaining jurisdiction the fact that the counterclaim involved an amount in excess of the required sum. However, in a later decision, *Goldstone Co.* v. *Payne*, 94 F. 2d 855 (2d Cir. 1938), the court indicated that the second jurisdictional ground in *Ginsburg* was dictum; *accord, Rudder* v. *Ohio State Life Ins. Co.*, 208 F. Supp. 577 (E.D. Ky. 1962). Likewise, the Fifth Circuit in *Horton*, having first decided that the plaintiffs' claim met the requisite jurisdictional amount of $10,000, appears to have indulged in dictum by commenting on the defendants' counterclaim as a ground for jurisdiction. The Supreme Court's review of the *Horton* case failed to squarely consider the Fifth Circuit's counterclaim dictum.

diction and that he has waived all objections thereto. This analysis is grounded on the assumption that if the defendant-counterclaimant had won the race to the courthouse and filed his suit first, he would have filed it at a federal courthouse. Therefore, when the defendant-counterclaimant files such a claim without objection to federal jurisdiction, the federal court must refuse to dismiss the lawsuit. Although the above analysis is a plausible rationale for nondismissal of a counterclaim which has been filed by a defendant who has made no objection to federal court jurisdiction, it is inapplicable when grounds of equity and fairness dictate otherwise, as in the case at bar, where continuous objection to federal jurisdiction was made by the defendant Mrs. Simpson.[5]

As Professor Moore points out: "Since, however, defendant did not originally choose the federal forum, the option should be his whether or not to keep the action in federal court." 1 J. MOORE, FEDERAL PRACTICE ¶ 0.98[1], at 896 (2d ed. 1964). Professor Moore's observation is squarely applicable to the case before us, since it appears from the record that defendant-counterclaimant, Mrs. Simpson, most emphatically did not want to have her counterclaim tried in a federal court.

With these distinctions in mind, we are of the opinion that the amount sought in Mrs. Simpson's counterclaim should not govern the jurisdictional question here presented, but that the plaintiff-viewpoint rule, requiring dismissal of this action, is the fairer and more logical test to be applied.

The final jurisdictional contention made by Motorists Mutual is that the district court should have taken judicial notice of the fact that the insurance company was required under the terms of the policy to defend those insured and that consequently these expenses should be added to the face value of the policy to produce the requisite jurisdictional amount.[6] Motorists Mutual cites as authority *Allstate Ins. Co.* v. *Dillard*, 190 F. Supp. 111 (E.D. Pa. 1960). That case is distinguishable from the case at bar in that there a declaratory judgment action was brought against the insured and

[5] *Accord, American Sheet & Tin Plate Co.* v. *Winzeler*, 227 F. 321 (N.D. Ohio 1915).

[6] The policy provides in part: "[T]he company shall defend any suit . . . seeking damages which are payable under the terms of this policy . . . ."

not merely injured third-parties. Consequently, the court in *Dillard* was correct in adding to the $10,000 face value of the policy there in issue the cost of attorneys' fees which the insurer, Allstate, by contract was obligated to incur in the defense of the defendant-insured. If the declaratory judgment defendant is the insured, then the cost of defending should be included where the insurer owes the insured a defense. When, however, the defendants are injured third-parties, it is impermissible to include costs of a defense of the insured, since the insurer does not owe any of the injured third-party defendants a defense. By the terms of the insurance contract here in issue, the limit of Motorists Mutual's liability to Hertz is $5,000 and to Mrs. Simpson is $10,000. Since the purpose of the instant action was to establish Motorists Mutual's nonliability as to these claims, it was error for the district court to assume jurisdiction because the amount in controversy was not in excess of $10,000.

Our views are in accord with those of Professor Moore who has stated that the amount in controversy is determined in a declaratory judgment action as it is in other types of litigation requiring a jurisdictional amount. Dealing specifically with an insurance coverage situation, Professor Moore says: "Where an insurer denies his obligations under a liability insurance policy on the theory . . . that the accident was not within the coverage of the policy . . . the amount in controversy is measured by the injured third-party's bona fide claim against the insured, unless this exceeds the maximum limit of the policy, in which event the amount in controversy is the maximum limit of the insurer's liability under the policy." 6A J. MOORE, FEDERAL PRACTICE ¶ 57.23, at 3137-8 (2d ed. 1966).

Since the amount in controversy in this case was not in excess of $10,000, the district court was without jurisdiction under 28 U.S.C. § 1332(a). The judgment of the district court is reversed and the case is remanded with direction to dismiss the suit.

A true Copy:

Teste:

____, ____,

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION AT LAFAYETTE.

Lafayette Civil No. 363

MOTORISTS MUTUAL INSURANCE COMPANY, *Plaintiff*,

v.

THE HERTZ CORPORATION, TERESA SIMPSON, ADMINISTRATRIX, *Defendant.*

MEMORANDUM OF DECISION AND JUDGMENT

This action for declaratory relief was commenced by the plaintiff, Motorists Mutual Insurance Company, an Ohio corporation, against the defendants, The Hertz Corporation and Teresa Simpson, Administratrix of the Estate of Raymond K. Simpson, deceased. This cause came on for trial on June 26, 1967 and was tried to the court without the intervention of a jury.

Plaintiff brings this suit for the purpose of seeking a declaration of non-liability under a certain policy of automobile liability insurance, policy number 1.350106F10, issued December 10, 1962 to one Sylvester Griffin of Cincinnati, Ohio. On the morning of October 2, 1965, on U.S. Highway No. 52 north of Templeton, Indiana, in Benton County, and while the above insurance policy was in full force and effect, the insured automobile, a 1960 Oldsmobile owned by Griffin, was involved in an automobile-truck collision. As a result of said collision, the defendant Teresa Simpson's decedent was killed. The insured automobile was, at the time of the accident, being driven by one Thomas E. Penman, Jr., Griffin's brother-in-law.

In a separate action tried to this court at an earlier date, the same being Lafayette Civil No. 332, The Hertz Corporation and Teresa Simpson, Administratrix, the defendants herein, recovered a judgment against the driver of said vehicle, Thomas E. Penman, Jr. Hertz and Simpson claim that Penman was covered as an "insured" under Griffin's

policy of automobile liability insurance. Plaintiff, Griffin's insurer, contends on the other hand that Penman is not covered under its policy. This action was commenced in order to resolve this issue of coverage.

This court has determined that under the terms of the automobile liability insurance policy involved in this litigation, under the particular facts and circumstances of this case, and in light of the applicability of Ohio law to the construction of the relevant terms of the insurance policy herein involved, no coverage exists under said policy of insurance with respect to Thomas E. Penman, Jr.

At the outset, the court would dispose of defendants' attack on the court's jurisdiction over the subject matter of this litigation. Defendants argue, in substance, that inasmuch as the Griffin insurance policy had limits, with respect to this case, of $10,000.00 for bodily injury or death and $5,000.00 for property damage, it is only by virtue of an impermissible aggregation of claims of two separate and distinct claimants—namely, Simpson and Hertz—that plaintiff can exceed the amount of $10,000.00, exclusive of interest and costs, as required by 28 U.S.C.A. § 1332(a). Defendants' argument has superficial plausibility, but it goes no farther. This is a declaratory judgment action brought by a *single* party, the insurer of the subject automobile, wherein said party is exposed to a total potential liability under this *single* policy of insurance. The accident out of which plaintiff's potential liability arises was a single occurrence, and plantiff's liability or non-liability under the instant policy of insurance will likewise be decided as a single matter. *Franklin Life Insurance Co.* v. *Johnson*, 157 F. 2d 653 (10th Cir. 1946).

Generally, in a declaratory judgment action, it is the value of the liability of which plaintiff seeks to be relieved which determines the jurisdictional amount. See, e.g., *Davis* v. *American Foundry Equipment Co.*, 94 F. 2d 441 (7th Cir. 1938), and *Trinity Universal Ins. Co.* v. *Woody*, 47 F. Supp. 327 (D.C. N.J. 1942). Properly speaking, it is plaintiff's entire potential liability under its insurance policy, which liability turns on a construction of the terms of its insurance policy, which is the actual matter in controversy in this

action. See *Government Employees Insurance Company* v. *Lally,* 327 F. 2d 568 (4th Cir. 1964). This potential liability, or, stated another way, the pecuniary result to the plaintiff which a judgment in this action would directly produce, is without question in excess of the required jurisdictional amount, *Trail* v. *Green,* 206 F. Supp. 896 (D.C. N.J. 1962), inasmuch as the defendants herein are asserting both personal injury and property damage claims which, individually, exceed the policy limits of $10,000/$20,000 and $5,000, respectively.

The court holds that it has subject matter jurisdiction of the instant controversy.

With respect to the merits, plaintiff's position is classic. Plaintiff contends that Thomas E. Penman, Jr., the driver of the insured automobile, is not covered under the Griffin liability insurance policy on account of his not being able to qualify as an "insured" within the meaning of any of the terms of said insurance policy.

The insurance policy in effect at the time of the automobile accident of October 2, 1965 extends coverage and protection, to the extent therein provided, to the "insured." And, under *"Insuring Agreement III" at page 6 of the* policy, the word "insured" is defined. Only two of the definitions therein contained are immediately relevant for purposes of the case at bar.

In paragraph "a.4" of "Insuring Agreement III," the term "insured" is defined to mean

> "any person while using the automobile . . ., provided the *actual use* of the automobile is by or *with the permission* of a named insured . . ., *except* that such permission is *not required of the 'first-named insured'* . . . ." (Emphasis added.)

Under Paragraph b of the same section of the policy, the term "first-named insured" is defined as

> "the individual first named in the declarations and *while a resident* of such individual's household, the spouse of such person and any *relative* of either." (Emphasis added.)

Plaintiff contends, simply, that at the time and place of the Penman-Simpson accident, Thomas E. Penman, Jr., was not using the insured automobile with Griffin's "permission" and that neither was he a "first-named insured" within the meaning of that policy term inasmuch as he was not a "resident" of Griffin's household.

I. *The Facts*

The named insured, Sylvester Griffin, was Thomas E. Penman's brother-in-law, having married Penman's sister Gladys in August, 1964. Griffin and his wife resided at 860 Glenwood, Cincinnati, Ohio. In July of 1965, Penman, who had been in the United States Navy for a period of a little over ten years and, since 1963, stationed at the Great Lakes, Illinois, Naval Station, was discharged from the Navy. Penman went to Cincinnati. In 1963, Penman had been married, but by the time of his discharge in 1965, he had been divorced, and his former wife and two children lived in San Pedro, California. He did, however, leave the California address as his forwarding address. His purpose in coming to Cincinnati was to visit his relatives.

Upon arrival in Cincinnati in July 1965, Penman was met at the bus station by a sister, Lois Tillery, who drove him immediately to his mother's home at 817 Mann Place. Penman had with him his Navy sea bag, his trunk, some civilian clothes, his Navy dress suit, and some personal belongings. These were all brought to and deposited at Penman's mother's house.

Living at Penman's mother's house in July of 1965 were approximately ten persons, including Penman's mother, his sister (Jewel Green) and her six children, Gladys Griffin's brother (Robert Patterson), and Penman's stepfather. To accommodate these people were four bedrooms; however three of the four bedrooms were, for all practical purposes, unfurnished. Conditions there were quite obviously crowded.

Griffin's residence was located close to Penman's mother's house and could be reached very quickly from the back, across the alley. The Griffins were acquainted with Penman's mother. On the evening of Penman's arrival, the

Griffins came over, and Gladys Griffin invited Penman to sleep at their (Griffin's) house, for although the Griffins had only two bedrooms, there was only Mr. and Mrs. Griffin and one child staying there. Penman agreed, and subsequently spent his nights at the Griffins until he left Cincinnati some two weeks later. During the time that he slept at the Griffins, Penman shared a bedroom with Griffin's boy.

When Penman came over to the Griffins, he did not bring with him many of his belongings—in other words, he did not "move in." Indeed, Penman brought only a few articles of civilian clothing, on hangers, and kept nothing in drawers. During the ensuing two-week period while Penman was in Cincinnati, he neither looked for nor held a job, his main purpose for being in Cincinnati being to visit his relatives. Some of his meals, but not all of them, were taken with the Griffins, and he took care of his own laundry.

After spending two weeks in Cincinnati, Penman went back to Chicago, although he did not reinlist in the Navy at this time. Penman remained in Chicago, working on or near the naval base, until the latter part of September, 1965, at which time he returned to Cincinnati, arriving there on September 27, a Monday evening. Again when Penman arrived he went straight to his mother's house. Penman had left his trunk and his other belongings at his mother's (when he had gone back to Chicago), and they had remained there. Little had changed in the interim with respect to the housing situation, and so Penman again was invited to sleep at the Griffin's. And, as before, he brought with him to the Griffin home nothing more than some civilian clothes, and, this time, his Navy dress uniform. The day of Penman's arrival, September 27, 1965, was the first time Griffin had seen Penman since Penman had left Cincinnati in July.

From the time of his arrival on the 27th (Monday) until Friday night, October 1, Penman had borrowed Griffin's automobile once—on Thursday night— for the purpose of picking up some cigarettes. Penman brought the car right back at this time after about 10 or 15 minutes. On the evening of October 1 when Penman came over to the Griffin's (between 8:30 p.m. and 9:30 p.m.), he found Mr. and Mrs.

Griffin at home with one Ann Berry, one of Mrs. Griffin's girl friends with whom she worked during the week at Bathesda Hospital in Cincinnati. Penman had never met Ann Berry before.

At approximately 10:30 p.m., Penman asked Griffin whether he could borrow Griffin's car "to take Ann Berry home." Griffin agreed and told Penman that his car keys were on top of the dresser in his (Griffin's) bedroom. Penman went into the bedroom, obtained the keys, and left with Ann Berry. Nothing further was said by either party with respect to the use to which the car was to be put. Ann Berry's house was located in Cincinnati, Ohio, about one-half mile from the Griffin home.

Before taking Ann Berry home, Penman drove with her to the Q Lounge, a local club, and then took her to Frisch's Big Boy, an eating establishment, for something to eat. After taking her home, Penman did not return to the Griffin's, but went instead to his mother's home, getting there at about 1:00 a.m. He went inside and went to sleep on a couch, but awoke at about 4:00 a.m. He then announced to his sister, Jewel Green, who was awake at the time, that he was going to Chicago to reinlist.[1] She asked if she could go. He consented, and they both left for Chicago immediately. The accident occurred some four hours later in Benton County, Indiana.

II. *The Applicable Law*

Before reaching the merits, the court would make it abundantly clear that under the facts and circumstances of this case, the law of the State of Ohio, not Indiana, must govern the construction of the automobile liability insurance contract involved herein. The court is not here directly concerned with the circumstances of the underlying tort occurrence or of the law applicable thereto. See *William-*

[1] From the time of Penman's discharge from the Navy in July, Penman had a ninety-day period in which to reinlist. Thus, by the latter part of September, Penman's reinlistment period had not expired yet. Penman had reinlisted once before, in 1959, for a period of six years. Penman could reinlist at any Navy office, but by reinlisting at Chicago, Penman could receive his reinlistment bonus immediately.

son v. *Massachusetts Bonding & Insurance Company,* 19 Conn. Supp. 59, 109 A.2d 896 (C.P. 1954), aff'd, 142 Conn. 573, 116 A.2d 169 (1955). This court is concerned with the rights and obligations arising under and by virtue of the Griffin Automobile liability policy; and although to be sure, the tort plaintiffs (the defendants herein) have a vital interest in the outcome of the instant litigation, the inquiries into the properly applicable law are separable.

The insurance policy purchased by Sylvester Griffin was issued by the plaintiff insurance company and was delivered to the named insured in the State of Ohio. It was, in short, an Ohio contract. Griffin was at the time, and still is, an Ohio resident and domiciliary. The insured automobile was quite obviously intended to be used principally in the State of Ohio, thus localizing the principal situs of the risks covered by the insurance contract in the State of Ohio. See *Peterson* v. *Warren,* 31 Wis.2d 547, 143 N.W.2d 560 (1966). Additionally, and this is of some significance, the permission itself to use the automobile was granted by Griffin to Penman in the State of Ohio.

Generally speaking, absent a contrary intent manifested by the parties, or a contrary result compelled by statute, it has been held that the place where an insurance contract is "made," *Switzer* v. *Carroll,* 358 F.2d 424 (6th Cir. 1966 (Ohio law), or where it is written, issued, or delivered, see, e.g., *Roth* v. *Maryland Cas. Co.,* 209 F.2d 371 (3d Cir. 1954) (Pa. Law), *Moffat* v. *Metropolitan Casualty Company of New York,* 238 F.Supp. 165 (D.C.Pa. 1965) (Pa. law), governs the construction of contract terms and provisions and the rights and obligations arising thereunder. See also *Employers' Liability Assur. Corp* v. *Youghiogheny & Ohio Coal Co.,* 214 F.2d 418 (8th Cir. 1954) (Ohio law); *Nelson* v. *Insurance Company of North America,* 264 F.Supp. 501 (D.C.N.J. 1967) (N.J. law); and *Eagle Fire Insurance Company of New York* v. *Haskins,* 240 F.Supp. 283 (D.C. La. 1965) (La. law). In *State Farm Mutual Automobile Insurance Company* v. *Automobile Underwriters, Inc.,* 371 F.2d 999 (7th Cir. 1967), the Court of Appeals for the Seventh Circuit, applying Indiana conflicts law, stated, in

a declaratory judgment action similar to the one at bar, that:

> "Since the insurance policy was written and issued . . . in Indiana, the law of Indiana is to be applied in its construction."

See also *Clark* v. *Travelers Indemnity Company,* 313 F.2d 160 (7th Cir. 1960) (applying Indiana conflicts law) (Illinois law applied to construe omnibus clause of policy issued, etc., in Illinois. Accident was Indiana accident.); and *cf. Travelers Ins. Co.* v. *Eviston,* 110 Ind. App. 143, 37 N.E.2d 310 (1941). In the instant cause, the insurance contract itself offers no express guidance as to the parties' intent with respect to the question at hand, nor can this court find any other manifestation of intention with regard to this question.

Looking more closely at the actualities of the case at bar, it can be clearly seen that with the exception of the underlying tort occurrence, almost every single "contact" between the contracting parties was with the law of the State of Ohio. Under the circumstances of this case, it appears unquestionably that the state with the most significant relationship with the rights and liabilities arising under and by virtue of the insurance policy herein involved is the State of Ohio. *W. H. Barber Co.* v. *Hughes,* 223 Ind. 570, 63 N.E.2d 417 (1945). It must be presumed, therefore, that it was the intention of the contracting parties to have Ohio law apply to the construction of the contract terms.

While the parties have not seriously contested the applicability of Ohio law to the construction of the liability policy before this court, defendant Simpson does, nevertheless, offer an alternative, unsupported reference to a "well recognized principle in conflicts of laws that an Ohio contract will not be enforced strictly in Indiana where its enforcement would violate the settled public policy of Indiana." As applied to this case, such a statement is not only factually unwarranted, but is entirely inapposite.

Although the direction and philosophy of the law in Indiana, at least as thus far interpreted by the federal courts, seems clearly to be one of extreme liberality in finding

coverage under the standard omnibus clause,[2] this court is unable to draw from that a conflicts rule such as that which is implicit in defendant's argument, namely, that an Indiana court can under no circumstance apply the law of another state where an Indiana resident has been injured and where application of the foreign law, as opposed to application of Indiana law, would prevent the injured person from recovering under a contract of insurance.

In the first place, although to be sure, the ultimate beneficiary of omnibus coverage is the public, *Auto Owners (Mutual) Insurance Company* v. *Stanley,* 262 F.Supp. 1 (D.C.Ind. 1967), likewise, a beneficiary is the permittee himself, the individual who is allowed to operate the insured automobile and who, absent such omnibus coverage, might be otherwise unprotected against a judgment recovered against him. In fact, it has been held that an omnibus clause, as such, is for the benefit of the permittee. *Arnold* v. *State Farm Mutual Automobile Ins. Co.,* 260 F.2d 163 (7th Cir. 1958) (Indiana law). This broad omnibus coverage is not dictated by statute. Further, the only statutory provision which defendant could point to as even purporting to mandate any kind of minimum coverage under automobile liability insurance policies[3] requires only *part* of what is today in fact commonly included in the standard omnibus clause such as the one herein involved, and that part has been expressly held to apply to and protect only the owner-insured himself. *Spicklemeier* v. *T. H. Mastin & Co.,* 107 Ind. App. 350, 24 N.E.2d 797 (1940), approved in *Culley* v. *Farm Bureau Mut. Ins. Co. of Indiana, Inc.,* 224 Ind. 483, 69 N.E.2d 19 (1946).[4] Thus, not even the permittee himself is sought to be protected by

---

[2] This will be discussed briefly under Section III of this Memorandum of Decision.

[3] Burns Ind. Stat. § 39-4309 (1965 Repl.)

[4] In *Spicklemeier,* the court said:

> "It was not the purpose of this statute to provide that everybody who might drive the owner's car with his permission . . . should be insured against liability for negligence in its operation. . . . The mandatory provision of our statute, however, only requires that the owner of a motor vehicle who purchases such insurance shall be protected."

Indiana legislation, let alone the person injured by negligent permittees. Compare, e.g., Wis. Stat. Ann. § 204.30 (3)(1957 Supp.).[5] Of course, the contractual omnibus clause does protect the permittee and, to the extent that it does, also benefits the public by enabling the injured party to recover damages. However, while this court is fully committed to the so-called "liberal" rule in extending this contractual omnibus coverage to situations involving, for example, deviations from intended use, defendant has not shown this court a sufficiently compelling local interest, beyond the mere fact that Indiana appears to be evolving the law of permission along slightly different lines than Ohio, to justify overturning the overwhelming interest of the State of Ohio in the construction of the insurance contract provisions here in dispute. See *Clark* v. *Travelers Indemnity Company*, 313 F.2d 160 (7th Cir. 1960).

Accordingly, this court is constrained to reach the result hereinafter indicated on the merits, based upon an application of Ohio law to the facts of this case. The court would, however, emphasize that there does appear to exist a fundamental difference, both in philosophy and degree, between the Ohio law of "permission" and the law in this regard of the State of Indiana.

III. *Coverage Under Policy Paragraph a.4 of "Insuring Agreement III": Whether Penman was a covered permittee under said provision.*

This paragraph of the Griffin insurance policy affords what is commonly known as "omnibus" coverage and provides, in pertinent part, as follows:

> "As used in Insuring Agreements I and V, the unqualified word "insured" means:

---

[5] "No policy shall be issued or delivered in this state . . ., unless it contains a provision reading substantially as follows: The indemnity provided by this policy [applies] . . . to any person or persons while . . . operating any automobile described in this policy. . . . [provided that the] use or operation . . . be with the permission of the assured named in the policy. . . ."

> . . . any person while using the automobile . . ., provided the actual use of the automobile is by or with the permission of a named insured. . . ."

Assuming, as we may properly do in this case, that it is undisputed that "initial permission"—that is, permission to take and operate the automobile in the first instance, without regard to possible deviation from intended use—was in fact given, it is incumbent upon this court to ascertain the law of Ohio with respect to the scope of such permission, once given. Generally, courts have tended to pursue one of three modes of analysis, or "theories," in this regard. *First*, there is a so-called "strict" or "conversion" rule requiring that in order that the insured automobile be found to have been used with "permission" within the meaning of the policy term, it must be shown that the particular use being made of the automobile at the time and place of the accident involved was precisely the same use granted by or consented to by the named insured. *Second*, there is the opposite extreme of the "strict" rule, the so-called "liberal" rule which provides, in substance, that only "initial" permission to use the insured automobile is required. Under this mode of analysis, any deviation from intended use, whether slight or substantial, both temporally and geographically, is immaterial. *Third*, there is the so-called "minor deviation" rule which is in essence simply a middle ground between the extremes of the "strict" rule and the "liberal" rule. Courts adopting this mode of analysis must examine each case on its own facts to ascertain whether the deviation, if any, from intended use was slight or material, with coverage extended in the case of the former and denied in the case of the latter. See *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F.2d 161 (7th Cir. 1958), adopting this classification proposed in an annotation found at 5 A.L.R.2d 600, at 622.

In *Gulla* v. *Reynolds*, 151 Ohio St. 147, 85 N.E.2d 116 (1949), a case involving a deviation from intended use by an employee who had asked for and received permission to use his employer's truck to deliver an item of furniture which he, the employee, had just purchased from his em-

ployer, the Supreme Court of Ohio, in affirming the lower courts, held specifically that there was no coverage under the omnibus clause of the insurance policy involved in that litigation. The Ohio Court of Appeals had held [6] that:

> ". . . while no affirmative instructions against other use were given, yet all implications to be drawn from the circumstances tend toward definite limitation to make delivery but little more than one block away, as to distance, and return the truck directly and immediately to the parking lot as to time. Some three hours later and beyond the area necessary to the contemplated use and beyond the scope of the purpose for which the driver was in possession and outside the right of the user . . . this accident occurred." [7]

The Court of Appeals briefly reviewed some of the ways of construing permissive use provisions in liability insurance policies, devoting its analysis generally to two "doctrines": a so-called "minority rule," similar to what this court has previously referred to as the "liberal rule," and a so-called "majority doctrine," similar to what this court has previously referred to as the "minor deviation rule." The Court of Appeals refused to apply the initial permission ("liberal") rule advocated by the plaintiff and adopted instead its self-described "majority doctrine," to wit:

> ". . . [P]ermission by the owner to the use of his car by another *includes only such use as was reasonably contemplated by the owner,* as shown by the circumstances, and that while, even under this doctrine, a slight deviation would not necessarily exclude coverage, yet a *use by the operator outside the scope of the owner's contemplated permission excludes such use from being the permitted use within the terms of the policy.*" (Emphasis added.)

---

[6] 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

[7] The court also referred to an Ohio statute making it a criminal offense to use a motor vehicle without the "consent" of the owner and indicated that the deviation involved in *Gulla* may have even constituted such offense.

The Ohio court, in this regard, then fashioned a crucial distinction between omnibus clauses that refer only to "use" by the permittee and those which refer to "actual use," a distinction expressly rejected by some courts. See, e.g., *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F.2d 161 (7th Cir. 1958). Describing the purpose of including the term "actual" within the omnibus clause as an attempt to escape the operation of the "minority rule" ["liberal" or "initial permission" rule], the court quoted from 7 Appleman, *Insurance* § 4354:

> "The term 'actual use', as employed in the present policy, was drafted to confine the coverage to situations where the employment made of the vehicle *at the time of the accident* was within the scope of the permission granted." (Emphasis added.)

Further, the court continued:

> "It seems logical to this court that the term 'actual use' be construed as referable to the *use* being made of the car *at the time and place of the accident* and if that be outside the reasonable scope of the permission granted to hold that coverage is not extended to the driver." (Emphasis added.)

The Supreme Court of Ohio affirmed, stating that:

> ". . . the departure in the instant case . . . was complete. . . . Reynolds borrowed the truck for his own errand of a few minutes to make a delivery of a bed a distance of a block and a half but still had the truck five hours later in a different part of the city on a wholly different mission.
>
> "The lower courts were correct in declining to follow the extreme, minority rule which obviously lends itself to gross abuse by an unscrupulous individual who, in violation of his express instructions, might retain possession of the automobile indefinitely and operate it over unlimited territory with the insurance still in effect. If such extreme unlimited coverage is to be afforded, it would seem that in fairness to all concerned it should be so stated in the policy."

This is, therefore, a clear pronouncement by the highest courts of Ohio that Ohio does not subscribe to the view that initial permission, once granted, constitutes "permission" within the meaning of an Ohio omnibus clause notwithstanding a substantial deviation from the original use intended by the owner-insured. On the contrary, each case must be examined to determine (1) the nature and extent of the original permission granted by the owner-insured and (2) the use being made of the insured vehicle at the time and place of the accident. Then, in view of all of the circumstances, the extent of any deviation must be ascertained.

The Ohio courts had, even before *Gulla* v. *Reynolds,* required that in order to come within the protection of an omnibus clause extending coverage to one using the insured automobile with the permission of the insured, the court must determine whether the *actual* use *at the time of the accident* was within the scope of permission granted. See *Kazdan* v. *Stein,* 26 Ohio App. 455, 160 N.E. 506 (1927), 118 Ohio St. 217, 160 N.E. 704 (1927); *Denny* v. *Royal Indemnity Co. of New York,* 26 Ohio App. 566, 159 N.E. 107 (1927); *Trzick* v. *United States Casualty Co.,* 52 Ohio App. 246, 3 N.E.2d 684 (1935). And cases subsequent to *Gulla* continue to make the same distinction. See, e.g., *Marolt* v. *Lisitz,* 94 Ohio App. 298, 115 N.E.2d 169 (1952).[8]

Courts in other jurisdictions have applied a similar rule. In *Employers Mutual Casualty Company* v. *Poe,* 191 So.2d 541 (Miss. 1966), the court, citing *Gulla* v. *Reynolds,* emphasized the importance of the words "actual use" as used in the omnibus clause, holding there that the particular deviation involved in the case before the court was "substantial," thereby excluding coverage. And in *Hartford Accident & Indemnity Co.* v. *Peach,* 68 S.E.2d 872 (Va. 1952), it was held that the word "actual" intended to refer to the "particular use at the time in question." Still other courts have adopted the so-called "minor deviation" rule without making the express reference to the use of the

---

[8] ". . . even where permission to use an automobile is granted by the insured, the *actual* use by the permittee must be within the terms of the original purpose for which the consent was given."

words "actual use" in the particular omnibus clause. See, e.g., *Fidelity & Casualty Co. of New York* v. *Harlow*, 59 S.E.2d 872 (Va. 1950) ("Permission to do a specific thing is not permission to do all things."); *Harrison* v. *Densmore*, 183 S.2d 787 (Ala. 1966); *Speidel* v. *Kellum*, 340 S.W.2d 200 (Mo. 1960); *Wallin* v. *Knudtson*, 278 P.2d 344 (Wash. 1955), and *Western Pacific Insurance Company* v. *Farmers Insurance Exchange*, 416 P.2d 468 (Wash. 1966).

Some courts have expressly rejected any analysis that places such reliance on the use of one word in the omnibus clause. In *Small* v. *Schunke*, 201 A.2d 56 (N.J. 1964), the New Jersey Supreme Court, which follows the so-called "liberal rule," simply construed the word "actual" to mean that permission had to be given for the automobile's actual use and operation, without regard to time, place, or purpose. And in *Protective Fire and Casualty Company* v. *Cornelius*, 125 N.W.2d 179 (Neb. 1963), the Supreme Court of Nebraska, a state which has a so-called omnibus statute, held that the presence of the word "use" (alone) in the statute superseded and overrode the words "actual use" as found in the policy's omnibus clause.[9] See also *McConnell* v. *Travelers Indemnity Company*, 180 So.2d 406 (La. 1965).

However, it is without question that for purposes of the case at bar, this court must confine itself to an analysis of whether, under the facts and circumstances surrounding

---

[9] In this respect, the court must reject defendant's argument that Section 4509.51 of the Ohio Rev. Code mandates coverage in the present case. The dissenting judge in *Gulla* felt that Section 6298-7 of the General Code [now § 4509.01 et seq.] did, but the majority did not even devote any time to discuss the matter.

Defendants would have this court take the fact that there have allegedly been two subsequent revisions of the Code since *Gulla*, with the language of Section 4509.51 having not been changed, as an indication that indeed the dissent in *Gulla* is today the law of Ohio. The court would rather think that the subsequent revisions without change indicate, *if anything*, a tacit acquiescence in the *Gulla majority* opinion, although doubtlessly nothing at all could fairly be said to be inferable from the unchanged nature of Section 4509.51. The predecessor of this section was on the books when *Gulla* was decided, and even if we read this section of the Code into the instant policy, as may well be proper in this case, it would appear to have no effect on the construction to be given the omnibus clause herein involved.

the grant of permission by Sylvester Griffin to Thomas E. Penman, Jr., the use being made of the insured automobile by Mr. Penman on the morning of October 2, 1965 in Benton County, Indiana, was within the scope of the permission granted. The court is compelled to reach the conclusion that Penman's use of the automobile grossly exceeded any permission given him for the use of said automobile.

Obviously, the very nature of the analysis employed by the Ohio courts precludes the applicability of fixed or precise standards by which to judge whether the scope of permission has been substantially exceeded.[10] This determination can only proceed on a case-by-case basis, and, for guidance, this court must look to the Ohio decisions.

In *Gulla* v. *Reynolds,* the extent of the deviation was slight as compared to the facts of the case at bar, involving, to be sure, a use somewhat beyond the scope of that which was granted, but at a time no more than four hours after the original permission was granted and in the same city. In *Denny* v. *Royal Indemnity Co. of New York,* 26 Ohio App. 566, 159 N.E.107 (1927), an employee, charged with the responsibility of driving his employer's car to the Post Office and back for the purpose of picking up the day's mail, deviated from said route in order to see his mother. The court refused to find that the employee was within the scope of the policy coverage. Likewise denied coverage was the employee in *Trzich* v. *United States Casualty Co.*, 52 Ohio App. 246, 3 N.E.2d 684 (1935), who, although having his employer's permission to drive the company truck to and from work and although he had been told not to use the truck for the purpose of "running around," nevertheless took the truck from Akron, Ohio, the situs of his employer's business and the employee's residence, to Youngstown, Ohio. However, see *Brown* v. *Kennedy,* 141 Ohio St. 457, 48 N.E.2d 857 (1943), wherein a second permittee was held to be covered inasmuch as he was operating the insured automobile in furtherance of the permittee's purposes. The court warned, nonetheless, that had the evidence disclosed

[10] See the criticism in this regard of the "minor deviation rule" itself by Hastings, J., in *Arnold* v. *State Farm Mutual Automobile Insurance Company,* 260 F. 2d 161 (7th Cir. 1958) (Indiana law).

that the second permittee was driving alone on some mission of his own, a different situation would be presented. Compare, *West* v. *McNamara,* 159 Ohio St. 187, 111 N.E.2d 909 (1953).

Although the facts involved in *Denny*, with respect to the extent of the deviation, seem rather mild, the facts involved in the case at bar surely obviate the necessity of putting such a case as *Denny* up against it. Thomas Penman requested permission to use the Griffin automobile *for the purpose* of taking Ann Berry home, a distance of approximately one-half mile. It was 10:30 p.m. when the request was made and, inasmuch as Penman had used Griffin's car on one prior occasion (the night before) and had returned it promptly after completing his errand, and inasmuch as Griffin had to go to work the next morning and needed his car for that purpose,[11] there was no reason at all, under all the circumstances then existing, that Griffin should have either known or suspected that Penman was going to do something else with his car.

When Griffin awoke the next morning to find that his car was not in front of the house and that Penman was gone, he immediately went over to Penman's mother's house to inquire as to Penman's whereabouts. He was unable to find out where Penman was, although a little six-year old girl had earlier mentioned to Griffin that Penman might be on his way to Chicago. Griffin did not believe her. Griffin then walked his wife over to the bus stop, went to work at Mr. Wilson's, and from there telephoned the police to find out whether there had been any reported accidents involving a 1960 Oldsmobile. While Griffin did not report that his car had been stolen, no reason appears why he should have done this. And, although defendants argue strongly that his failure to report his car stolen is inconsistent with the plaintiff's present assertion that Penman was at the time of the accident operating the Griffin vehicle without Griffin's permission, defendants fail to realize that there

---

[11] Griffin worked at a valve company Monday through Friday and required his car for transportation purposes. Griffin would also customarily take his wife by car to the bus stop every morning. On Saturdays, Griffin worked as a part-time caretaker for a Mr. Holden Wilson.

are more than two polar alternatives—especially under the law of Ohio. An automobile may be operated without its owner's "permission" within the meaning of an omnibus clause and yet not be considered stolen.

Penman had actually never returned Griffin's car to the house, having taken it instead over to his mother's house (perhaps to pick up some of his things!) and, some three hours later, leaving directly from there destined for Chicago. Quite obviously then, it would have been highly unlikely for Griffin even to have missed his automobile until the morning when he awoke to get ready for work. Nothing which Griffin did, either before or after allowing Penman to use his car, could be deemed to have been an implied assent by Griffin to Penman's continued use of his car. See *Kazdan* v. *Stein*, 26 Ohio App. 455, 160 N.E. 506 (1927), aff'd, 118 Ohio St. 217, 160 N.E. 704 (1927); *Mazdra* v. *Selective Insurance Company*, 398 S.W.2d 841 (Mo. 1966); *Crenshaw* v. *Harleysville Mutual Insurance Company*, 144 S.E.2d 810 (S.C. 1965). Compare *Krebsbach* v. *Miller*, 125 N.W.2d 408 (Wis. 1963). The accident herein involved occurred approximately nine hours after original permission had been given and under circumstances wherein original permission would have appeared to have been requested and sought by Penman for a very short period of time—perhaps no longer than an hour or two. Yet the accident occurred in another state, approximately 150 miles distant from the city of Cincinnati, and while Penman was enroute, cross-country, to Chicago, Illinois. Ann Berry had long since been taken home. Likewise, the purpose for which the Griffin automobile was being used at the time of the accident was wholly and entirely different than the purpose for which the car had been given to Penman on the night of October 1.

In short, while many of the Ohio cases involving the issue of permission have concerned business permittee situations and hence should be properly observed in a slightly more restricted light than situations such as the case at bar, where the alleged permittee is a relative of the named insured, this consideration is one of degree, to be applied to the particular facts and circumstances of each case. The

inquiry ultimately is the same, however: Did the driver-permittee *at the time of the accident* have the named insured's permission to operate the insured automobile? Under the facts of the case at bar, this court finds that Penman had substantially and materially deviated from the scope of the permission which had been granted to him. Accordingly, this court holds that under the law of Ohio Penman was not an "insured" within the meaning of the omnibus clause of Griffin's insurance policy.

The court would refer to one additional matter with respect to the Ohio law of permission. Defendants attempt, rather obliquely, to show the court that *Gulla* v. *Reynolds* has somehow either been emasculated or, *sub silentio,* overruled. They point to the case of *Costa* v. *Cox,* — Ohio App. —, 171 N.E.2d 529 (1958), aff'd, 168 Ohio St. 379, 155 N.E.2d 54 (1958), wherein Cox was involved in an automobile accident while driving an automobile belonging to his uncle, Howe, which automobile was insured by Buckeye Union Casualty Company. Buckeye denied liability under the uncle's policy, setting up defenses of lack of permission, failure to give timely notification, and failure to cooperate. Factually, the uncle had given permission to his nephew, Cox, to drive the Howe automobile on September 12 for the purpose of transporting Howe from his home in Barberton, Ohio, to his place of employment in Akron, Ohio, then to proceed to pick up Howe's wife in Akron and take her back to Barberton, and then to return to Akron at about 4:30 p.m. to pick up Howe at work. Cox delivered Howe to Akron at about 8:00 a.m. The normal driving time between Barberton and Akron was twenty-five minutes. At approximately 1:00 p.m., while driving the insured vehicle in Akron, Cox was involved in the accident as a result of which his liability arose.

These facts and the proceedings had thereon present no special problem. The trial judge, apparently being of the opinion that there was sufficient evidence in the record to justify submitting the issue of permission to the jury, did so, and the jury determined that (as stated by the court):

> "... Cox, *at the time of the accident,* was driving the car with the permission of the named insured. . . ." (Emphasis added.)

This reference to the issue of premission is the only reference to that issue contained in either the Court of Appeals or the Supreme Court opinion. The facts related by the Court of Appeals are at best sketchy, but readily indicate that the scope of permission granted by the insured owner was quite broad, contemplating highway driving between cities on at least three occasions during the same day. The accident took place on the very same day and in one of the two cities in which Cox could properly drive in carrying out his assignment. The only deviation appears to have been one of time, and whether the scope of permission contemplated such a deviation or whether the deviation was "slight" within the meaning of the Ohio law of permission was a question which was resolved, for the plaintiff (in favor of coverage), by the jury. One dissenting judge on the Supreme Court, writing at Page 58 of 155 N.E.2d, felt that *on the evidence* for the court to have allowed the question to go to the jury, it would have had "to disregard" *Gulla* v. *Reynolds.*

This, then, is the basis upon which defendants would have this court hold that the present-day law of Ohio would permit—indeed, would compel—a finding that permission existed in the present case. Nothing could be farther afield. In the first place, the present case is miles apart factually from *Costa.* Secondly, the very language used by the Court of Appeals in affirming the trial court's actions indicate that the court was indeed applying the *Gulla* v. *Reynolds* test of looking to the *time of the accident* and determining whether permission existed as of that time. See Page 533, 171 N.E. 2d. The facts and, hence, the outcome were simply different than the present case. And finally, even Judge Matthias, who dissented in *Gulla* v. *Reynolds,* at Page 122 of 85 N.E. 2d, and who was with the majority in *Costa,* dissented in *Gulla* not on the issue of permission, but, rather, on the grounds that to the extent of $5,000, Section 6298-7 of the Ohio General Code (a part of the Ohio financial responsibility law, corresponding to § 4509.01 et seq. of the Revised Code) compelled coverage. Defendants would indicate that Judge Matthias' switch from dissent in *Gulla* to majority in *Costa* heralds a change in the Ohio law of permission. This is simply not so, and a brief excerpt from Judge Matthias' dissent in *Gulla* will make this abundantly clear:

> "I am in accord with the conclusion of the majority that Reynolds was not, at the time of the accident, included within the definition of the word, 'insured,' as used in the omnibus clause of the policy. . . . Reynolds was driving the truck in disregard of the instructions of the owner, a gross violation of the original permission granted him. Such use was excluded from coverage by the requirement in the policy that 'the *actual* use of the automobile' must be 'with the permission of the named insured.' "

Defendant's contention that Ohio would today adopt the liberal rule with regard to the question of permissive use is without foundation and disregards the clearly stated law of that state.

The court at this time would reiterate, however, that this result is reached on an application of Ohio law to the particular facts of this case. This court need not now determine what the outcome of this case would be were the law of Indiana to have applied. However, the distinct differences between Indiana's developing case law on the subject of permissive use and the status of the Ohio law on that subject must be noted. In *Arnold* v. *State Farm Mutual Automobile Insurance Company*, 260 F.2d 161 (7th Cir. 1958), the Court of Appeals for the Seventh Circuit, applying Indiana law, held, on the rationale of *American Employers' Ins. Co.* v. *Cornell*, 225 Ind. 559, 76 N.E.2d 562 (1948), and *Mercer Casualty Co. of Celina, Ohio* v. *Kreamer*, 105 Ind. App. 358, 11 N.E.2d 84 (1937), that:

> ". . . under Indiana law, one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee. This is to say that under such circumstances a *deviation in use from that intended by the insured owner will not operate to terminate such permission granted.* . . ." (Emphasis added.)

Arnold involved an employee who was entrusted with the use of his employer's truck in order to oversee the owner's two farms and who deviated from this purpose to go into a town some fifteen miles distant and purchase some illegal whiskey. Coverage was upheld in that case. Subsequently, although the court cautioned that "the rule in this case should not be extended unnecessarily beyond the boundaries of this case, since in other situations there may be factors which Indiana courts may find to terminate permission." This "liberal" rule announced in *Arnold* has been reiterated and applied numerous times by the federal courts applying Indiana law. See *Auto Owners (Mutual) Insurance Company* v. *Stanley*, 262 F.Supp 1 (D.C.Ind. 1967) ("permission" found where minor secured the permission by means of misrepresentations, though limited to the facts of that case); *Home Mutual Insurance Company* v. *Automobile Underwriters, Inc.*, 261 F.Supp. 402 (D.C. Ind. 1966) (second permittee held covered); and see *State Farm Mutual Automobile Insurance Company* v. *Automobile Underwriters, Inc.*, 371 F.2d 999 (7th Cir. 1967) (second permittee held covered), and *Riehl, et al.* v. *National Mutual Insurance Company*, 10 Ind. Dec. 49 (7th Cir. 1967) (vendee held covered).

This court would, of course, be bound to follow both the spirit and philosophy of the foregoing cases were the choice-of-law problem to have been resolved in favor of application of the Indiana law of permission to the instant controversy. That not being the case, and while this court considers the Indiana law and federal cases applying Indiana law which have dealt with the question of permission to have laid down the better rule, this court is not free to disregard the clearly stated construction of the term by the courts of the state whose law must govern the present controversy.

IV. *Coverage under Paragraph b of "Insuring Agreement III": Whether Penman was a "Resident" of the Named Insured's Household.*

Any person who is deemed a "first-named insured" under Paragraph b of "Insuring Agreement III" is taken

out of the group which must acquire and maintain the named insured's permission in order to be covered under the named insured's liability policy. Paragraph b defines "first-named insured" as follows:

> ". . . the individual first named in the declarations and while a resident of such individual's household, the spouse of such individual and any relative of either."

There is no question but that Thomas E. Penman, Jr., was a "relative" within the meaning of Paragraph b. He was Mrs. Griffin's brother and, by way of marriage, was Sylvester Griffin's brother-in-law. Rather, the problem is encountered with respect to Penman's status as a "resident" of the Griffin household at the time he took Griffin's automobile on the night of October 1, 1965.

The court has exhaustively researched this rather troublesome facet of the law and has read the briefs that have been submitted by the parties. Based on the evidence in the record of this case, and, within all reasonable limits, resolving every ambiguity and uncertainty which inheres in the term "resident" strictly against the insurer, and giving Penman every benefit of the doubt, this court is of the opinion that Thomas E. Penman, Jr., was not a "resident" of the Griffin "household" on the evening of October 1, 1965.

In *American Universal Insurance Company* v. *Thompson*, 384 P.2d 367 (Wash. 1963), the issue was whether an unemancipated son of the named insured was a "resident" of the named insured's household. The son was a minor, had left home to join the army, although he stored his belongings at his parents' home and came home on his furloughs. On the grounds that the son was only away from home temporarily and hadn't, in the meantime, established a residence anywhere else (an intervening marriage had been annulled), the court held that he was an additional insured under the automobile liability policy. Similarly, in *Detroit Automobile Inter-Insurance Exchange* v. *Feys*, 205 F.Supp. 42 (D.C.Calif. 1962), the court, applying Michigan law, found that a son who had joined the Navy but had re-

turned home on his fifteen- and thirty-day furloughs was a "resident" of his father's home so as to be covered under the father's liability policy. And a thirty-two-year-old son who had left home upon his marriage, but who subsequently returned after he was divorced and had lost his job, and who continued to live with his parents while he was trying to locate other work, was held to be a "resident" of his father's household in *National Farmers Union Property & Casualty Co.* v. *Maca*, 132 N.W.2d 517 (Wis. 1965).

However, in *American Casualty Company of Reading, Pennsylvania* v. *Crook*, 197 F.Supp. 345 (D.C.W.Va. 1961), aff'd, 301 F.2d 846 (4th Cir. 1962), the named insured's brother-in-law was found not to have been a "resident" of the named insured's household. Yet the brother-in-law had actually lived with the named insured for a number of months the year before, but left thereafter in order to live in Florida. But the next year he returned and had stayed with the named insured a period of some four days when the accident occurred. Despite the fact that the brother-in-law had brought all of his personal belongings with him and participated in the social and family activities of the named insured, the court held that each period of the brother-in-law's stay must be viewed independently and that, all in all, he was not to be deemed a "resident" within the meaning of the policy. And in *State Farm Mutual Automobile Insurance Company* v. *Smith*, 142 S.E.2d 562 (Va. 1965), the named insured, who lived in California, left the state and went to visit her sister. She was pregnant and took her children with her to her sister's house intending to stay there until she had the baby. While living with her sister and while driving an automobile belonging to her sister, the named insured was involved in an accident. Her insurance policy gave her protection if she was operating a "non-owned" vehicle, but the same policy would have prevented the sister's automobile from being considered a "non-owned" automobile within the meaning of the policy if, in effect, the named insured was a "resident" of her sister's household. The court held that she was not a resident, but was, rather, a "visitor" or "sojourner." Similarly, in *Goens* v. *Arinder*, 161 So.2d 509 (Miss. 1964), a

son-in-law was held not to have been a "resident" of his father-in-law's household, notwithstanding that he was actually living there with his wife and child while he was working on his own new house a short distance away from the father-in-law's house. His sister-in-law had driven his automobile and had had an accident, but she would have been covered (as it turned out she was) under her own father's liability insurance policy insuring the use of "non-owned" vehicles. But, if the son-in-law would have been deemed a "resident" of the father's household, the son-in-law's automobile would not have been considered a "non-owned" automobile within the meaning of the policy.

A number of additional cases will suffice to present the proper background against which this court must ultimately assess the meaning and legal effect of the term "resident [of the insured's] household" as used in the instant policy of liability insurance.

In *Jamestown Mutual Insurance Company* v. *Nationwide Mutual Insurance Company*, 146 S.E.2d 410 (N.C. 1966), plaintiff insurance company, the insurer of a dealer's automobile which was damaged by S's negligence while S was driving the car as a prospective purchaser thereof, sued the defendant insurer of S's father's automobile (which was not involved in the accident). The court held, in accordance with plaintiff's position, that S was covered under his father's policy of insurance inasmuch as S was a "resident" of his father's household and hence was covered for his operation of a non-owned automobile. Factually, S had, prior to the accident, left his parents' home, but had since returned and at the time of the accident was living at their home, was eating and sleeping there and having his laundry included in the family laundry, was using the facilities of the house at will, and was intending to remain there for an indefinite period of time. In contrast, a minor son, who had run away from home at the age of seventeen, who had later returned, but who then joined the Navy and came home only occasionally on leave, was found, in *Allen* v. *Maryland Casualty Company*, 259 F.Supp, 505 (D.C.Va. 1966) (Illinois law) (dictum), not to have been a "resident" of his father's household within the meaning of his father's lia-

bility insurance policy. But in *American Service Mutual Insurance Company* v. *Pugh*, 271 F.2d 174 (8th Cir. 1959) (Missouri law), a son who before going into service had lived with his parents and brother at home and who returned from the service on a forty-five-day furlough was found to have been a "resident" of his father's household.

The varying factual situations involved in the foregoing cases, and the apparent inconsistency in result which the holdings reveal, may be somewhat harmonized by examining the consequence, in each case, of the court's determination of residency or non-residency. In *American Casualty Company of Reading, Pennsylvania* v. *Crook*, 197 F.Supp. 345 (D.C.W.Va. 1961), aff'd, 301 F.2d 846 (4th Cir. 1962), the individual who was liable as a result of the automobile accident was the named insured's son, the driver. The automobile being driven at the time belonged, however, to the named insured's brother-in-law. The named insured's automobile liability policy covered non-owned automobiles being driven by the named insured's son, but the problem was in the fact that the policy definition of a "non-owned" automobile would not cover an automoblie owned by a relative of the named-insured if that relative was a "resident" of the named insured's household. Thus the problem. By finding that the brother-in-law was a "resident," insurance coverage would be denied, and a finding that he was not a "resident" would result in policy coverage. The court, in finding that the brother-in-law was not a "resident" of the named insured's household, was in effect ruling in favor of insurance coverage. Similar results were consequent on the determinations of non-residency in *State Farm Mutual Automobile Insurance Company* v. *Smith*, 142 S.E.2d 562 (Va. 1965), and in *Goens* v. *Arinder*, 161 S.2d 509 (Miss. 1964). Looking at the consequence of the court's determinations of residency, however, in *American Universal Insurance Company* v. *Thompson*, 384 P.2d 367 (Wash. 1963), *Detroit Automobile Inter-Insurance Exchange* v. *Feys*, 205 F.Supp. 42 (D.C.Calif. 1962), and in *National Farmers Union Property & Casualty Co.* v. *Maca*, 132 N.W.2d 517 (Wis. 1965), it is evident that the result in each case was again to find insurance coverage under the circum-

stances. These six cases, therefore, all of them discussed previously in this memorandum, are uniform in this limited respect. There are exceptions, of course, to wit: *Allen* v. *Maryland Casualty Company,* 259 F.Supp. 505 (D.C.Va. 1966) (Illinois law) (dictum), also previously discussed, and e.g., *Johnson* v. *State Farm Mutual Automobile Liability Insurance Company,* 252 F.2d 158 (8th Cir. 1958) (Missouri law), and *Perry* v. *Southern Farm Bureau Casualty Ins. Co.,* 170 So.2d 628 (Miss. 1965), but, in general, it is quite apparent that there is a general tendency for a court to give the ambiguous and uncertain term "resident" a broad construction where the court is faced with an issue of inclusion within a policy's coverage, and a narrow construction where the court is faced with an issue of exclusion from a policy's coverage. See, e.g., *Cal.-Farm Insurance Co.* v. *Boisseranc,* 312 P.2d 401 (Cal. App. 1957). This court subscribes to that viewpoint.

However, it is a far cry from giving a policy term a "broad" construction, in favor of insurance coverage, to completely ignoring the term. Stated another way, defendants would have this court find that because the policy term "resident" is ambiguous and uncertain or, at the least, is imprecise, ergo there is coverage under the Griffiin insurance policy. There is no such rule of construction.

There is no denying that the term "resident"—used variously, with nuances of meaning; depending, for example upon whether the term is used in context of a venue controversy or one that involves incidents of taxation, voting, or divorce—is fraught with ambiguity and uncertainty, that is, as a term of general application.

Where language which is used in an insurance contract is ambiguous or lacks certainty, it should be construed liberally in favor of the insured. *Peterson* v. *Nationwide Mutual Ins. Co.,* 175 Ohio St. 551, 197 N.E.2d 500 (1964); *Butche* v. *Ohio Casualty Ins. Co.,* 174 Ohio St. 144, 187 N.E. 2d 20 (1962); *Munchick* v. *Fidelity & Casualty Co. of New York,* 2 Ohio St.2d 303, 209 N.E.2d 167 (1965). With this broad and general proposition this court is in full accord. Strictly speaking, of course, for purposes of the present litigation, a liberal construction would actually be in favor

of insurance *coverage* rather than the "insured," for to assume that Thomas E. Penman, Jr., is the "insured" is to improperly assume that which it is the very purpose of this lawsuit to determine; and to view Sylvester Griffin as the "insured" is of no help inasmuch as Griffin himself had little, if any, personal interest in the outcome of this litigation. See *West* v. *McNamara*, 159 Ohio St. 187, 111 N.E.2d 909 (1953); *Cook* v. *Kozell*, 176 Ohio St. 332, 199 N.E.2d 566 (1964). Thus, while ambiguities and uncertainties inherent in the term "resident" and in the phrase "resident of [the named insured's] household" will be resolved in favor of insurance coverage, implicit in this rule of construction is a *choice* between alternatives. Accordingly, as between two or more *plausible* interpretations, *Rhodenbaugh* v. *Preferred Acc. Ins. Co. of New York*, 67 F.Supp. 379 (D.C. Ohio 1946), aff'd, 160 F.2d 832 (6th Cir. 1946), or, stated another way, where an ambiguous or uncertain contract term or phrase requires construction or interpretation because of its being *fairly susceptible* of several different but *sensible and reasonable* readings, *Chavers* v. *St. Paul Fire & Marine Insurance Company*, 295 F.2d 812 (6th Cir. 1961); *Copelin-Mohn, Inc.* v. *Buckeye Union Casualty Co.*, 135 Ohio St. 287, 20 N.E.2d 713 (1939); *Kitt* v. *Home Indemnity Co.*, 153 Ohio St. 505, 92 N.E.2d 685 (1950), that construction or interpretation will be employed which will favor insurance coverage. It should be noted that this does not say that where there is an ambiguity the court *will find* coverage! Rather, it is to say that the court must first determine that there *is* a construction or an interpretation which under the circumstances of the particular case could *reasonably* be found to apply so as to bring the facts within the policy's coverage, and only then will the court tend to favor or adopt such alternative. This is the very point involved in the court's disposition of this particular aspect of this lawsuit—namely, that on the basis of the evidence before this court and the conclusions of law with respect to the very *minimum* which the term "resident" may be fairly said to import, this court cannot say that, on *any* reasonable or sensible construction of the term, Thomas E. Penman, Jr., was, on the evening of October 1, 1965, a "res-

ident'' of Sylvester Griffin's household. This court cannot rewrite the insurance policy involved in this litigation, *Trimble* v. *Western & Southern Life Ins. Co.*, 83 Ohio App. 102, 82 N.E.2d 548 (1948), which is what the court would in effect be doing were this court to transcend the applicable canons of construction and adopt the conclusions advocated by the defendants.

The term ''resident'' and the phrase ''resident of [the named insured's] household'' does not appear to be defined within the body of the insurance policy. Accordingly, this court should give to these words their usual and natural meanings in the particular context in which they are used. *Garlick* v. *McFarland*, 159 Ohio St. 539, 113 N.E.2d 92 (1953); *Yeager* v. *Pacific Mutual Life Ins. Co.*, 166 Ohio St. 71, 139 N.E.2d 48 (1957); *Brescoll* v. *Nationwide Mutual Insurance Co.*, 116 Ohio App. 537, 189 N.E.2d 173 (1961).

Black's Law Dictionary (4th ed.) defines ''residence'' succinctly as a ''factual place of abode.'' Webster's Third New International Dictionary places similar emphasis on the aspect of having a settled place of abode or dwelling. Neither definition would require the aspect of permanence, but, it is submitted, both definitions and practically the entire case law on the subject require something *more than raw physical presence*, however transient or unsettled. *Cf. Routt* v. *Barrett*, 71 N.E.2d 660 (Ill. 1947).

In *Hardware Mutual Casualty Company* v. *Home Indemnity Company*, 50 Cal. Rptr. 508 (Cal. App. 1966), the court stated that:

> ''[It is] not necessary in order to be a resident of the same household . . . to have to be living there as a permanent family member. . . . [*A*] *resident* [*is one other than*] *a temporary or transient visitor*, who lives together with others in the same house for a period of some duration, although he may not intend to remain there permanently.'' (Emphasis added.)

And in *National Farmers Union Property & Casualty Co.* v. *Maca*, 132 N.W.2d 517 (Wis. 1965), the court, per Fairchild, J., discussed the meaning of the term ''resident'' at some length in a case involving inclusion within policy coverage on a determination of residency, and said:

"The expressions, 'resident of household,' 'member of family,' and the like appear (as in this case) in provisions excluding from coverage liability for such injuries to persons standing in such relationship to the named insured. The purpose has been explained as 'to exempt insurer from liability to those persons to whom insured, on account of close family ties, would be apt to be partial in case of injury'. . . . [Such expressions] appear in automobile liability policies in so-called 'drive-other-car' provisions, excluding liability arising out of the use of other automobiles owned, hired, or regularly used by a member of the insured's household. The purpose is to avoid coverage of several vehicles owned by members of the same family, who, by their close intimacy, might be expected to use each other's cars without hindrance and with or without permission. Such expressions appear, as in this case, in definitions of additional insureds. The purpose is *to provide protection for those whom, because of close relationship, a person obtaining a liability policy would ordinarily want it to protect.*

"Although the purposes differ, *these expressions are used in all cases to describe a common type of close relationship,* varying greatly in detail, *where people live together in a closely-knit group,* usually because of close relationship by blood, marriage or adoption and deal with each other intimately [and] informally. . . .

"*We think that one is not a resident of the household . . . if, even though he has no other place of abode, he comes under the family roof for a definite short period or for an indefinite period under such circumstances that an early termination is highly probable.*" (Emphasis added.)

In *State Farm Mutual Automobile Insurance Company* v. *Walker*, 334 S.W.2d 462 (Tex. Civ. App. 1960), a case in which a girl, an insured owner of an automobile, was found not to have been a "resident" of the household of a family with whom she *roomed and boarded,* the court said:

"[U]nder general rules of construction . . . there should be a fair and reasonable construction of the

> language of the policy, rather than a strained, unnatural, or technical interpretation. . . .
>
> "A rather unreasonable and ridiculous result would flow from any attempt to ascribe to the term . . . 'resident' a meaning which would embrace any and all persons who sleep within and take meals at [the building or structure which houses the insured and his 'household']. . . ."

Finally, the court, in *Goens* v. *Arinder,* 161 So.2d 509 (Miss. 1964), holding that the named insured's son-in-law was not a "resident" of his household, stated:

> "The word 'resident' means one having more than physical presence. The *transient visit of a person for a time to a place does not make him or her a resident while there.* The word . . . imports a fixed abode for the time being, as distinguished from a place of temporary abode or a temporary sojourn." (Emphasis added.)

In *Goens,* the son-in-law and his family were in the process of constructing a house near in location to the named insured's home, and they were invited to come and stay with the named insured so that the son-in-law wouldn't have to travel so far back and forth and so that the named insured's daughter (the son-in-law's wife), who was pregnant at the time, could be better taken care of and more comfortable in the interim.

It appears, therefore, on an exhaustive survey of the cases involving a construction of the term "resident" and of the phrase "resident of [the named insured's] household," that, even assuming the most liberal, flexible, and broad interpretation of the term and phrase, it does mean something other than mere presence, and the words used cannot be simply disregarded. *Barnes* v. *Great American Indemnity Co.,* 60 Ohio App. 114, 19 N.E.2d 903 (1938). The court would note, not by way of limitation, but by way of observation only, that in almost every litigated case in this area, and certainly in almost every case cited by the parties in their briefs, a close blood relationship existed

between the individual whose status was in controversy and the family comprising the "household" and was almost exclusively one of parent-child. But much more fundamentally, every single case in which there was a determination that the individual was a "resident" of a particular household involved a previous or a present pattern of living together as a family unit or at least living together under circumstances such that there existed an interrelationship which, for lack of a better term, we may call "familial integration." In other words, while this court recognizes that a nonrelative, or a distant relative, or a close relative not ordinarily thought of as forming part of the family group or unit can, under appropriate circumstances, be deemed to be a "resident" of the named insured's "household" within the meaning of those terms as used in the instant automobile insurance policy, that individual must be living or dwelling together with the named insured (and the other members of his household) as part of a family unit. As it were, they must form part of a domestic circle. See *State Farm Mutual Automobile Insurance Company* v. *Walker*, 334 S.W.2d 462 (Tex. Civ. App. 1960).

In importing a bare minimum of meaning to the term "resident" as used in the phrase "resident of [the named insured's] household" this court cannot ignore the purpose and effect of this very phrase in the ordinary automobile liability insurance policy and, in particular, the policy involved in this litigation. A clause similar, although not identical, to the one herein at issue has been described as having been designed, in part, to replace the old-style omnibus clause with its "use other cars" concomitant and to have as one of its features

> ". . . coverage for use of an owned automobile by any resident of the named insured's household, *regardless of permission.* The 1955 standard provisions [Standard Family Automobile Policy] accomplished that purpose so far as the resident spouse was concerned. The family automobile policy extends that coverage to use by *anyone residing in the household.* The result is that all of the cases which have litigated questions of permission for use by Junior or other

> relatives or servants residing in the household have become obsolete. . . . There is now coverage for use by all of such persons whether or not the use of the owned automobile is *in fact with* the *permission* of anyone *and even if the use is prohibited.*" (Emphasis added.)

Risjord and Austin, "Standard Family Automobile Policy," Insurance Law Journal, No. 411, April, 1957, p. 199. These comments are apropos of the clause involved in the instant case, for although it does not purport to cover *any* "resident" and is restricted to a "resident" who is also a "relative," the *effect* of this provision is to extend insurance protection, once the qualifications for coming within the scope are met, literally without limitation. The very words of the policy make this clear. The named insured whose insurance policy is involved would, under such circumstances, have absolutely no control over choosing the persons who could operate his automobile and enjoy the benefits of his own insurance protection. Accordingly, common sense would indicate that the requirement of residence contemplates and rests on an assumption that, as between the individual and the named insured's "household," there is something akin to a feeling and relationship of mutual concern, interest, and affinity such as exists, or normally exists, between members of the same family or household. After all, the main target of this clause was Junior who, perhaps contrary to an express prohibition against use by his parents, nevertheless violated his instructions and had an accident. Indeed the very presence in the same clause in which the term "resident" is used of the term "household" would indicate that the requirement refers to a *relationship* rather than to an impersonal physical fact of being in the same house. See, e.g., *State Farm Mutual Automobile Insurance Company* v. *Smith,* 142 S.E. 2d 562 (Va. 1965), and *State Farm Mutual Automobile Insurance Company* v. *Walker,* 334 S.W.2d 462 (Tex. Civ. App. 1960).

A quick review of the facts involved in the case at bar, although previously discussed at greater length, will suffice to underline that on the most liberal interpretation, Thomas

E. Penman, Jr., although Sylvester Griffin's brother-in-law, was on the evening of October 1, 1965 nothing more than a relative (by marriage) who, on two different occasions spanning a period of about three months and for an aggregate maximum of about eighteen days, spent his nights at the home of the named-insured and that he was most assuredly not a "resident" in any reasonable sense of the word.

Thomas E. Penman, Jr., was not a "member" of the Sylvester Griffin family. He was not a charge of the Sylvester Griffin family. He was an adult and had completed ten full years of service in the United States Navy before spending his first night at the Griffin home. His point of reference, or center of activity, if any he had in Cincinnati, was his mother's house, not the Griffin's, for it was to his mother's house that he went directly upon arriving in town both in July and again in September, and it was at his mother's house that he kept and stored almost all of his personal things. Indeed if Penman was a "resident" of any household in July and September, he was a resident of his mother's household, for residence need not always be accompanied by physical presence. See, e.g., *Taylor* v. *State Farm Mutual Ins. Co.*, 171 So.2d 816 (La. App. 1965), aff'd, 178 So.2d 238 (1966) (son held to be resident of father's household although he was living with his uncle), and *American Casualty Co.* v. *Harleysville Ins.*, 208 A.2d 597 (Md. 1965) (wife held to be resident of husband's household although she slept away at night), both cited by defendants. Penman was invited to sleep at the Griffin's house because sleeping conditions were crowded at his mother's. He ate some, but not all, of his meals at the Griffin's. His laundry was his own responsibility. Moreover, Penman's total "stay" at the Griffin's was about fourteen days in the month of July and then, after a gap of about two months, another four days (preceding the October 2 accident) in September. The record is absolutely devoid of any evidence that Penman intended to stay at the Griffin's home for any appreciable length of time, nor is there even any indication that he intended to remain in Cincinnati. In fact, his returning to Chicago after two weeks,

in July, and his returning again to Chicago after four days, in September, belies any intention to remain in Cincinnati. Furthermore, Penman's announced purpose in coming to Cincinnati was simply to "visit my people." He neither sought nor found employment in Cincinnati. Beyond what is indicated above, defendants have shown no other evidence, nor is there any in the record, that would indicate any other relationship, coexistence, or common ties between Penman and the Griffins or that Penman was any part of the Griffin "domestic circle." They were friends, to be sure, but for purposes of the Griffin insurance policy and, specifically, Paragraph b of "Insuring Agreement III," Penman was a mere casual visitor or guest, not a "resident."

Accordingly, this court holds that Thomas E. Penman, Jr., was not a "first-named insured" within the meaning of that term as contained in the insurance contract herein involved.

This memorandum contains the court's findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

JUDGMENT

It is therefore considered, ordered, adjudged, and declared:

That, on the morning of October 2, 1965, at the time and place of the automobile-truck collision involving Thomas E. Penman, Jr., driving the insured automobile, and Raymond K. Simpson, deceased, Thomas E. Penman, Jr., was not an "insured" under plaintiff Motorists Mutual Insurance Company automobile liability insurance policy, number 1.350106F10;

That Thomas E. Penman, Jr., was not using the insured automobile with the "permission" of the named insured or anyone authorized to grant such permission within the meaning of "Insuring Agreement III," Paragraph a.4 of said insurance policy; and

That Thomas E. Penman, Jr., was not a "first-named insured" within the meaning of "Insuring Agreement III," Paragraph b of said insurance policy.

Entered this 21st day of August, 1967.

____, ____,
United States District Judge.

(6499-8)